

**Attorneys for Plaintiffs
Carole Migden, Friends of Carole Migden
Committee, and Re-Elect Senator Carole
Migden Committee**

CAROLE MIGDEN, et al.,
Plaintiffs,

CALIFORNIA FAIR POLITICAL PRACTICES
COMMISSION, et al.,

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: April 16, 2008
Time: 10:00 a.m.
Crtrm.: 25

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION NO. 2:08-CV-00486-
EFB

1 This matter came on for hearing on Plaintiffs' Motion for Preliminary Injunction on
2 April 8, 2008. Plaintiffs were represented by James C. Harrison, Esq., and defendants were
3 represented by Lawrence Woodlock, Esq. The Court, having heard the arguments of counsel and
4 considered the written submissions, finds as follows:

5 1. Defendant Fair Political Practices Commission has informed plaintiff State
6 Senator Carole Migden that she is prohibited from using \$647,000 in campaign funds raised in
7 previous elections in her campaign for re-election to a second term in office because it considers those
8 funds be "surplus funds" under California Government Code section 89519.

9 2. In order to effectively campaign for a hotly contested primary election on
10 June 3, 2008 against three well-known challengers, particularly in order to communicate with the half
11 of her constituency that votes absentee, Senator Migden must commit her campaign funds to mailers,
12 radio and cable television advertisements by early April.

13 3. Plaintiffs have exhausted their attempts to resolve the matter with defendants
14 informally, and have no plain, speedy or adequate remedy at law.

15 4. Plaintiffs are likely to prevail on the merits of their claim that, on its face,
16 section 89519 of the California Government Code violates the First and Fourteenth Amendments of the
17 United States Constitution to the extent it limits a candidate's ability to transfer lawful campaign
18 contributions from one campaign committee to another campaign committee of the candidate's
19 because:

20 a. The transfer of campaign contributions from one campaign committee to
21 another committee of the same candidate is an expenditure of campaign funds.

22 b. The expenditure of campaign funds involves core political speech
23 protected by the First Amendment and restrictions on such speech must be narrowly tailored to meet a
24 compelling state interest. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976); *Service Employees Int'l*
25 *Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir. 1992).

26 c. There is no compelling state interest in enforcing the "intra-candidate" transfer
27 ban in section 89519. *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d
28

1 1312, 1322 (9th Cir. 1992); *see also Missouri Government PAC v. Maupin*, 71 F.3d 1422, 1428
2 (8th Cir. 1995).

3 d. Section 89519 is not narrowly tailored to justify the restriction.

4 5. Plaintiffs are also likely to prevail on the merits of their claim that, as applied,
5 section 89519 of the California Government Code violates the First and Fourteenth Amendments of the
6 United States Constitution to the extent it limits Senator Migden's ability to transfer lawful campaign
7 contributions from one campaign committee to another campaign committee because other candidates
8 similarly situated have use of such contributions, and the FPPC has allowed another Senator who
9 missed the arbitrary transfer deadline to use her surplus funds for a new election.

10 6. Plaintiffs have demonstrated that they will suffer irreparable harm if a
11 preliminary injunction is not issued because:

12 a. "The loss of First Amendment freedoms, for even minimal periods of
13 time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

14 b. Senator Migden will be severely hampered in her ability to communicate
15 effectively with voters in her district and will be at a disadvantage during her re-election campaign.

16 c. Section 89519 limits public discussion about candidates as well as issues
17 of local concern.

18 7. Serious questions have been raised about the constitutionality of section 89519
19 and its application to Senator Migden; and

20 8. Defendants California Fair Political Practices Commission, et al. shall not suffer
21 any irreparable harm in being barred from enforcing section 89519, so the balance of harms tips in
22 plaintiffs' favor.

23 Upon the basis of the foregoing, the Court hereby ORDERS:

24 1. That defendants, their officers, agents, servants, employees, and persons in
25 active concert or participation with them shall not take any action to enforce section 89519 against
26 plaintiffs and shall not otherwise prohibit Senator Migden from transferring the funds in her 2004
27 Committee account (approximately \$647,000) to her 2008 Committee account for use in connection
28 with the 2008 election.

1 2. That this preliminary injunction shall remain in effect until otherwise ordered by
2 this Court, or until final resolution of this matter.

3 3. That bond is waived.

4 IT IS SO ORDERED.

5 DATED:

6
7
8 UNITED STATES DISTRICT COURT JUDGE

9 (00052777-4)

1 **PROOF OF SERVICE**

2 I, the undersigned, declare under penalty of perjury that:

3 I am a citizen of the United States, over the age of 18, and not a party to the within
4 cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

5 On March 7, 2008, I served a true copy of the following document(s):

6 **[Proposed] Order Granting**
7 **Plaintiffs' Motion for Preliminary Injunction**

8 on the following party(ies) in said action:

9 Scott Hallabrin, General Counsel *Attorneys for Defendants*
10 Lawrence T. Woodlock,
11 Senior Commission Counsel
12 Fair Political Practices Commission
13 428 "J" Street, Suite 620
14 Sacramento, CA 95814-2329
15 Phone: (916) 322-5660
16 Fax: (916) 327-2026
17 Email: shallabrin@fppc.ca.gov
18 Email: lwoodlock@fppc.ca.gov

- 14 ☐ **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed
15 envelope or package addressed to the person(s) at the address above and
16 ☐ depositing the sealed envelope with the United States Postal Service, with
17 the postage fully prepaid.
18 ☐ Placing the envelope for collection and mailing, following our ordinary
19 business practices. I am readily familiar with the businesses' practice for
20 collecting and processing correspondence for mailing. On the same day
21 that correspondence is placed for collection and mailing, it is deposited in
22 the ordinary course of business with the United States Postal Service,
23 located in San Leandro, California, in a sealed envelope with postage fully
24 prepaid.
25 ☒ **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope
26 or package provided by an overnight delivery carrier and addressed to the persons
27 at the addresses listed. I placed the envelope or package for collection and
28 overnight delivery at an office or a regularly utilized drop box of the overnight
delivery carrier.
☐ **BY MESSENGER SERVICE:** By placing the document(s) in an envelope or
package addressed to the persons at the addresses listed and providing them to a
professional messenger service for service.

1 ☐ **BY FACSIMILE TRANSMISSION:** By faxing the document(s) to the persons
2 at the fax numbers listed based on an agreement of the parties to accept service by
3 fax transmission. No error was reported by the fax machine used. A copy of the
4 fax transmission is maintained in our files.

5 ☒ **BY EMAIL TRANSMISSION:** By emailing the document(s) to the persons at
6 the email addresses listed based on a court order or an agreement of the parties to
7 accept service by email. No electronic message or other indication that the
8 transmission was unsuccessful was received within a reasonable time after the
9 transmission.

10 I declare, under penalty of perjury, that the foregoing is true and correct. Executed on
11 March 7, 2008, in San Leandro, California.

12 
13 _____
14 Kristen Snider
15
16
17
18
19
20
21
22
23
24
25
26
27
28